No. 2335

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

J. M. LEITER and FLOYD J. CAMPBELL,

Plaintiffs in Error,

vs.

THOMAS S. POINDEXTER,

Defendant in Error.

MOTION OF PLAINTIFFS IN ERROR FOR RE-HEARING.

Upon Writ of Error to the United States District Court of the District of Idaho, Central Division.

FORNEY & MOORE and WILSON & NEAL,
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Attorneys for Defendant in Error.

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PETITION FOR REHEARING.

Now comes the plaintiffs in error and respectfully petition this Honorable Court for a rehearing herein, for the following reasons, to-wit:

The Court in its opinion, as we understand it, hold that the jury found as a fact that defendant did not sign the instrument with its condition of a promise to

pay, and that, therefore, it was clearly no longer material to determine whether the instrument, with the condition in it, is or is not a negotiable promissory note.

The defendant testified upon the trial, as shown on pages 48 and 49 of the Transcript of Record, as follows:

"Q. You were a witness in this case last November here, were you not?

A. Yes, sir.

Q. And you examined at that time plaintiffs' Exhibit A (the note in question) did you not?

A. Yes, sir.

Q. And that is your signature?

A. Yes, sir.

Q. Now, as I understand you, you read this over carefully before signing it?

A. Yes, sir.

Q. And you did not understand at all you were signing a note, did you?

A. There was no note here, only a blank form.

Q. You examined everything on the paper, did you?

A. Yes, sir.

Q. And when you saw this portion of the instrument, what did you think about it?

'For value received I promise to pay to A. C. Ruby Company the sum of.....Dollars, payable at the Merchants' National Bank, Portland, Oregon, in payments as follows: .....
.....
with interest from date at the rate of eight per cent, payable semi-annually, and, if not so paid the whole amount of both principal and interest to become due and collectible at the option of the holder hereof; and in case suit or action is instituted to collect payment, I agree to pay reasonable attorney fees.'

Did you sign all of that?

A. Yes, sir; all of that was printed."

The defendant also sets forth in his answer (Trans. p. 12) the instrument that he signed, showing the same as above.

This shows conclusively that the defendant, at least, signed the note with the blank spaces unfilled, and the lower Court instructed the jury that the defendant admitted the signature on the note was his (Trans. of Record, p. 152).

The defendant further testified (pp. 41 and 42 Trans. of Record) that when he signed the paper there was nothing made out in the way of a note. It was blank, only the printed part, and when the papers were made out he was ready to close the deal and turn over the horse.

"Q. Mr. Watson told you that?

A. Yes, sir; he was not ready to make out the papers to finish up the deal. I says: 'I have no papers to make out, and what I got to do with that?' and he says: 'You will have to sign the contract before I can deliver the horse over to you.' I says: 'Very well. And what kind of a contract have you got. I will look at it.' He showed me, and I told him I did not like to sign any contract like that, and asked him if he had any other. He told me that was the only contract the company furnished, and I told him I did not like to sign a blank like that, and I stood a little and said to myself that a big company like that would not try to beat a man, and I signed my name to the contract, and there was nothing in it but the blanks on that date.''

It is further clear from the defendant's own testimony that he signed the note ''Exhibit A'' shown on page 163 Trans. of Record, containing all the printed portion. The defendant simply claimed that the amount and time of payment were filled in after he delivered it to Watson, the agent of the A. C. Ruby Company.

It was also admitted, as shown on pages 34 and 35 of the Trans. of Record, that the plaintiffs were bona fide holders of the note.

This presents a situation where it is admitted defendant signed the instrument in the form shown in plaintiffs' ''Exhibit A'' with the exception of amount and time of payment; that the instrument was delivered to Watson as agent of the A. C. Ruby Company, by the defendant, after he had signed it in blank, as he says, and that said instrument was duly transferred by A. C. Ruby Company to the plaintiffs, prior to its maturity, for value; in other words, that plaintiffs were bona fide holders of the paper. Under these circumstances we

submit that the law is that if the defendant signed a blank note, as he says he did, and delivered same to A. C. Ruby Company, or the agent of A. C. Ruby Company, and after it was delivered by the defendant it was filled in as to the amount and time of payment, as defendant claims, and was thereafter transferred, prior to maturity, to plaintiffs as bona fide holders, that the fact that as between defendant and A. C. Ruby Company, the note would not be good would not be a defense as against the plaintiffs who are bona fide holders thereof.

This question has been passed upon by the Supreme Court of the United States in the case of the Bank of Pittsburgh vs. John S. Neal et al., reported in 22 Howard (U. S.) 96, from which we quote the syllabus:

"Where a party to a negotiable instrument entrusts it to the custody of another, with blanks not filled up, such negotiable instrument carries on its face an implied authority to fill up the blanks, and to perfect the instrument.

"A bona fide holder of a negotiable instrument, for a valuable consideration, without notice of the facts which impeach its validity between the antecedent parties, if he takes it before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity."

The same rule is laid down in Ogden on Negotiable Instruments, section 33, pages 281, 282 and 283, where a large number of cases are cited, holding to the same effect.

Section 5847 of Lord's Oregon Laws, being a portion of the negotiable instrument act adopted in the

States of Oregon and Idaho, provides:

"Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein, and a signature on a blank paper delivered by the person making the signature, in order that the paper may be converted into a negotiable instrument, operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto, prior to its completion, it must be filled up strictly in accordance with the authority given, and within a reasonable time; but if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given, and within a reasonable time."

In view of the negotiable instrument act, and of the authorities cited, we submit that the decision of the Court wherein the Court holds that, by reason of the fact that the case was submitted to the jury, and the jury found that the note was not signed in the form in which it appeared at the trial, was conclusive, and that, therefore, it was not necessary to pass upon the question whether the instrument, as filled in, was a negotiable instrument is erroneous.

At the close of the testimony, as shown by the record, the plaintiffs requested the Court to instruct the jury that the instrument was a negotiable promissory note, and objected to the refusal of the Court to so instruct, which objection was overruled, as shown by the record, page 148, and we submit that, under the admissions of

the defendant, above set forth, it was the duty of the Court to so instruct the jury. The question whether the instrument was a negotiable instrument or not was a question of law for the Court to decide, and not to be submitted to the jury. If the Court can say that the instrument, in the form sued upon, does not constitute a negotiable instrument, then, of course, the judgment must be affirmed; but, if the instrument in its present form is negotiable, then the fact that it was signed in blank by the defendant would be no defense as against the plaintiffs.

For the foregoing reasons, we respectfully submit that the Court should grant a rehearing herein, or reverse and set aside the judgment of the lower Court.

Respectfully submitted,

WILSON, NEAL & ROSSMAN,

Attorneys for Plaintiffs in Error.

United States of America,

District of Oregon.

I, O. A. Neal, one of the attorneys for the plaintiffs in error hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for purposes of delay.

.....,

Of Attorneys for Plaintiffs in Error.